UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
WASHINGTON, D.C. 20001

DATE: September 30, 1997

CASE NO.: **96 INA 123**

In the Matter of:

FRANCO ENTERPRISES, INC.,
Employer

on behalf of

NOE SAUCEDO,
Alien

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of NOE SAUCEDO (Alien) by FRANCO ENTERPRISES, INC., (Employer) under § 212(a)(5) (A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at San Francisco, California, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

On December 20, 1993, the Employer, Franco Enterprises, Inc., applied for alien labor certification on behalf of the Alien, Noe Saucedo, to fill the position of "Arc Welder." AF 75-144. Employer required four years of experience on the job offered and that the applicant provide written and verifiable references. AF 75.[3] The job duties were described as follows:

> Welds together metal Bodyframes for Mobile Homes as specified by Layouts, Blue Prints, Diagrams, using Arc-Welding equipment, welds in flat, Horizontal, Vertical, and Overhead, positions, Examine weld for bead size and other specifications.

AF 75. (Verbatim quotation is uncorrected.)[4]

In the February 28, 1995, Notice of Findings (NOF), the CO advised that certification would be denied because of the Employer's job requirement that applicants have four years' experience in the job and because the Employer's criteria relating to mobile homes, layouts, blueprints, diagrams, and verifiable references did not appear to meet its true minimum requirements at the time that it hired the Alien. In both instances the Employer was given the alternative of either deleting the offending hiring criteria or demonstrating that they

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[2]Administrative notice is taken of the Dictionary of Occupational Titles (DOT), published by the Employment and Training Administration of the U. S. Department of Labor.

[3]The job was to be forty hours a week at $8.75 an hour, a rate that later was increased. AF 75.

[4]The Alien worked for Employer from September 1991 to the date he signed the application, December 16, 1993. His duties were the same as those listed in the Employer's application. From November 1986 to December 1990 he was employer as an Arc Welder in a welding shop in Mexico. While performing many of the same operations, he was welding car and truck frames. AF 144.

were a business necessity.[5] The Employer was also directed to show that its requirement of references was the usual practice of this occupation or industry. In addition, the CO found that the Employer had rejected for reasons that were neither lawful nor job-related the applications of three qualified U. S. workers who had responded to the job offer.[6] The CO concluded that the Employer had failed to conduct a good faith recruitment effort.

The Employer's March 23, 1995, rebuttal addressed each of the issues stated in the NOF. AF 06-67. On May 22, 1995, the CO's Final Determination denied certification on grounds that (1) the Employer's requirement of three years' experience was excessive for an arc welder in the context of this application. The CO concluded that the requirement of four years' experience on the job offered was restrictive within the meaning of 20 CFR § 656.21(B)(2)(i)(A), based on the standard set out in the Specific Vocational Preparation (SVP) experience rating for an Arc Welder in the Dictionary of Occupational Titles (DOT).[7] (2) The CO further concluded that the Employer failed to show convincingly that it had made a good faith effort to recruit any of the four qualified U. S. workers who applied for the position it offered. AF 04-05. The Employer appealed to BALCA on June 22, 1995. AF 01-03.

Discussion

Employer disagrees with the CO's finding that it failed to establish the business necessity of its hiring criteria for this position and asserts that it made a good faith effort to recruit the U. S. workers who applied for the job that it offered. AF 01-03.

Business necessity. The use of unduly restrictive job requirements in the recruitment process is proscribed by 20 CFR § 656.21(b)(2). Unless an employer establishes the business necessity for its job requirements it cannot use skill criteria that are not normal for the occupation or that are not included

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[5]The CO inferred that the Alien did not meet those requirements in that he did not have the requisite experience and did not submit any such references. In addition, the CO said, the Employer had caused the Alien to become trained after he was hired. AF 71.

[6]The finding was based on the Employer's requirement that each candidate file an application and another copy of their resume before the Employer would consider them for the position. This extra step was unnecessary, as the Employer already had in its possession the resumes transmitted by the State Employment Service. AF 72.

[7]Welder, arc, is # 810.384-014 in the DOT. This title encompasses a worker who welds together mobile homes. The Specific Vocational Preparation rating for this trade is 5, "Over 6 months up to and including 1 year."

in the DOT. On the other hand, if the employer documents that the prescribed skill is normal for the occupation or that it is included in the DOT, business necessity need not be established. An employer can prove business necessity by showing that (1) the job requirement bears a reasonable relationship to the occupation in the context of the employer's business, and (2) the requirement is essential to performing in a reasonable manner the work described in the employer's application for alien labor certification. **Information Industries, Inc.,** 88 INA 082(Feb. 9, 1989)(en banc). In evaluating employer's documentation of business necessity, the Board has held that vague and incomplete rebuttal evidence will not meet the employer's burden of proof. **Analysts International Corporation,** 90 INA 387(July 30, 1991). Employer's mere assertions concerning its hiring requirements without the support of persuasive evidence is not sufficient to prove the business necessity of required job skills that are not included in the DOT or otherwise established as normal for the occupation. **Princeton Information Ltd.**, 94 INA 057 (July 5, 1995).

Employer's rebuttal discussed arc welding as it related to the fabrication of mobile homes, among other subspecialties, outlining some of the techniques a tradesman is expected to apply in pursuing this occupation. While helpful, this presentation did not offer any reason to infer that a worker could not learn the skills needed before being hired as an arc welder for the Employer's work. AF 08-09. The lengthy set of sample plans and photographs that apparently relate to the Employer's business do not contradict this inference, as the sketches on their face appear simple to read with brief training;[8] the arc welding work, as described by the Employer appears grounded on straight forward shop methods; and the specific duties stated in the application, as quoted above, are consistent with the inferences that the CO drew from the rebuttal evidence.[9] Because 20 CFR § 656.21(b)(5) requires an employer to show that the job requirements in the application represent the employer's actual minimum requirements for the job, it is concluded that the CO's finding that this Employer failed to show why it is not feasible to hire a U. S. worker with less than the stated requirements should be affirmed

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[8]AF 26-67.

[9]It is noted in passing that the duties enumerated in the application do not on their face require arc welding skills at a skill level of an eight thousand hour union apprenticeship program and the oral examination that the Employer suggests. Computing the four thousand working hours of a union apprenticeship on the basis of a two thousand hour year leads to the inference that the Employer's exhibit argues that a worker cannot be hired as an arc welder unless he has served a two year apprenticeship and passed the oral examination of the union's training apprentice program. On its face it is apparent that the Employer's application does not suggest that it requires this level of expertise to perform the work it describes, and Employer does not claim either that the Alien graduated such a program or that he has met the qualifications that a union apprenticeship seems to offer in the work of this trade. AF 15.

because it is based on sufficient evidence. **Jackson and Hull Engineers**, 87 INA 547 (Nov. 24, 1987).[10]

The CO's finding that the Employer's recruitment effort was insufficient under the Act and regulations is grounded on the fact that even though the State Employment Office sent Employer the resumes of four U. S. workers on or before September 30, 1995, Employer's letter to the candidates required them to submit a job application and a second copy of their resumes before it would act on their applications for this job. As a result, none of the U. S. workers was available for the position. Employer's rebuttal was not responsive. It simply asserted that it wrote to each of the four named applicants, and that Mr. Ochoa, Mr. Campa, and Mr. Jimeniz did not reply, while Mr. Banks declined the offer of an interview. AF 12. 17. As this rebuttal was not an answer to the explicit questions of the NOF, the CO reasonably concluded that Employer failed to prove that it had made timely contact with the four candidates. Because the NOF required documentary evidence to prove its good faith recruitment effort, the Employer was expected to comply by supplying tangible evidence of its efforts, including dated return receipts for the letters Employer alleges it sent, and phone company statements for any billable telephone calls it made. As the Board said in **Princeton Information Ltd.**, supra, an Employer's mere assertion of the recruitment efforts on which it relies is not sufficient to prove the facts described in its letter. Consequently, the CO's finding that Employer failed to sustain its burden of proof is supported by sufficient evidence, and the Employer did not demonstrate a recruitment effort that is consistent with the Act and regulations. **H. C. LaMarche**, 87 INA 607(Oct. 27, 1988).[11] 20 CFR §§ 656.20(c)(8), and 656.21(b)(6).

Accordingly, it is concluded that the CO correctly denied certification, and the following order will enter.

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[10]As all of the U. S. candidates were qualified according to their resumes, it may be inferred that those workers who did respond to the job offer were duly qualified and could perform the duties of this position, with nominal on-the-job training. **Mindcraft Software, Inc.**, 90 INA 328(Oct. 2, 1991). The reason Employer's restrictive requirements violate the Act and regulations is that its restrictive job requirements were perceived as restraining other U. S. candidates from applying for the job.

[11]Also see **Bobby McGee's**, 91 INA 039 (Apr. 15, 1992).

ORDER

The Certifying Officer's denial of labor certification is Affirmed for these reasons.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

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Sheila Smith, Legal Technician

BALCA VOTE SHEET

CASE NO.: 96 INA 123

FRANCO ENTERPRISES, INC., Employer
NOE SAUCEDO, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: September 23, 1997